

**Internal Revenue Service**

Number: **201534005**

Release Date: 8/21/2015

Department of the Treasury

Washington, DC 20224

Index Number: 263.00-00, 9100.00-00

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:IT&A:01

PLR-142163-14

Date:

May 13, 2015

In re:

**LEGEND:**

Taxpayer =

Short Period =

Date 1 =

Date 2 =

Corporation P =

Corporation Q =

Corporation R =

Corporation S =

Date 3 =

T =

V =

Date 4 =

Date 5 =

Accounting Firm =

Date 6 =

Date 7 =

Dear :

This responds to a letter ruling request dated October 30, 2014, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under §§ 301.9100-1 and 301.9100-3 of the Income Tax Regulations on Procedure and Administration to make an election for the treatment of a success-based fee in accordance with Rev. Proc. 2011-29, 2011-1 C.B. 746, which requires that a statement be attached to Taxpayer's original federal income tax return for the taxable year the success-based fee is paid or incurred. Taxpayer makes the request in connection with its federal income tax return for the Short Period return.

## FACTS

On Date 1, and as amended on Date 2, Corporation P, Corporation Q, Corporation R, and Taxpayer entered into a merger agreement. Pursuant to the merger agreement, (i) Corporation P agreed to merge with and into Corporation Q, with Corporation Q continuing as the surviving entity and (ii) Corporation R agreed to merge with and into Taxpayer with Taxpayer continuing as the surviving entity and a wholly-owned subsidiary of Corporation Q. Pursuant to the merger agreement, the Taxpayer merger would occur immediately following the consummation of the Corporation P merger. As a result of the mergers, former Corporation P shareholders would hold 60 percent of the outstanding equity of Corporation Q as the surviving corporation and former Taxpayer shareholders would hold 40 percent of the outstanding equity of Corporation Q. The Corporation P and Taxpayer mergers were to be effectuated through a voluntary prepackaged plan under the Bankruptcy Code.

On Date 3, T and V filed separate voluntary bankruptcy petitions in the Bankruptcy Court. On Date 4, the Bankruptcy Court entered separate orders confirming the bankruptcy plans. On Date 5, Taxpayer and Corporation P consummated the transactions contemplated by the merger agreement, including the mergers, effectuated the transactions contemplated by the bankruptcy plans and emerged from Chapter 11 protection. The name of the surviving corporation was changed to Corporation S, and Taxpayer became a subsidiary of Corporation S.

Taxpayer incurred fees related to the mergers. The fees were contingent on the successful closing of the mergers (success-based fees), and the success-based fees were paid on or about Date 5.

Taxpayer prepared its consolidated federal income tax return for the Short Period. Taxpayer decided to take advantage of the safe-harbor election provided in Rev. Proc. 2011-29. The federal income tax return, as filed, reflected a deduction of 70 percent of the success-based fee and capitalization of the remaining 30 percent, consistent with the requirements of the safe-harbor election. The return did not include, as an attachment, the statement required by section 4.01(3) of Rev. Proc. 2011-29 (taxpayer states it is electing the safe harbor election, identifies the transaction, and sets forth the success-based fees that are capitalized and those that are deducted). Accounting Firm reviewed the return before Taxpayer filed it. Taxpayer filed its return for the Short Period on Date 6.

On Date 7, prior to discovery by the Internal Revenue Service, a member of the tax department of Corporation S discovered that the election statement had been omitted. Taxpayer requests relief to late file the election. Permission to file a late election is within the discretion of the Commissioner under §§ 301.9100-1 and 301.9100-3. The statute of limitations has not run for the Short Period, and thus, the Short Period is still open to tax assessment.

## LAW

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a)<sup>1</sup> of the Income Tax Regulations provide that no deduction shall be allowed for any amount paid out for property having a useful life substantially beyond the taxable year. In the case of an acquisition or reorganization of a business entity, costs that are incurred in the process of acquisition and that produce significant long-term benefits must be capitalized. INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 89-90, 112 S. Ct. 1039, 117 L. Ed. 2d 226 (1992); Woodward v. Commissioner, 397 U.S. 572, 575-576, 90 S. Ct. 1302, 25 L. Ed. 2d 577 (1970).

Under § 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in § 1.263(a)-5(a). In general, an amount is paid to facilitate a transaction described in § 1.263(a)-5(a) if the amount is paid in the process of investigating or otherwise pursuing the transaction. Whether an amount is paid in the process of investigating or otherwise pursuing the transaction is determined based on all of the facts and circumstances. § 1.263(a)-5(b)(1).

Section 1.263(a)-5(f) provides that an amount that is contingent on the successful closing of a transaction described in § 1.263(a)-5(a) (i.e., a success-based fee) is an amount paid to facilitate the transaction except to the extent the taxpayer maintains sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction. This documentation must be completed on or before the due

---

<sup>1</sup> The reference is to § 1.263(a)-2 as contained in 26 CFR part 1 edition revised as of April 1, 2011.

date of the taxpayer's timely filed original federal income tax return (including extensions) for the taxable year during which the transaction closes.

Section 4.01 of Rev. Proc. 2011-29 provides a safe harbor election for taxpayers that pay or incur success-based fees for services performed in the process of investigating or otherwise pursuing a covered transaction described in § 1.263(a)-5(e)(3). In lieu of maintaining the documentation required by § 1.263(a)-5(f), a taxpayer may elect to allocate a success-based fee between activities that facilitate the transaction and activities that do not facilitate the transaction by treating 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and by capitalizing the remaining 30 percent as an amount that does facilitate the transaction. To make this election, the taxpayer must attach a statement to its original federal income tax return for the taxable year the success-based fee is paid or incurred, stating that the taxpayer is electing the safe harbor, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election. Section 301.9100-1(b) defines a "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election.

Section 301.9100-2 provides automatic extensions of time for making certain elections.

Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered under section 301.9100-2) will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer —

- (i) requests relief before the failure to make the regulatory election is discovered by the Internal Revenue Service;
- (ii) failed to make the election because of intervening events beyond the taxpayer's control;

(iii) failed to make the election because, after exercising reasonable diligence, the taxpayer was unaware of the necessity for the election;

(iv) reasonably relied on the written advice of the Service; or

(v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make the election.

Section 301.9100-3(b)(3) provides that a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer —

(i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested;

(ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. The interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made. The interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

## ANALYSIS

Taxpayer's election is a regulatory election, as defined in § 301.9100-1(b), because the due date of the election is prescribed in the Income Tax Regulations under § 1.263(a)-5(f). The Commissioner has the authority under §§ 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

The information and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith. One fact illustrating this is that Taxpayer discovered that the required statement was not filed with the return prior to any such discovery by the Service. Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time relief is requested. Taxpayer did not affirmatively choose not to make the election after having

been informed in all material respects of the required election and related tax consequences. Rather, Taxpayer intended to take advantage of the safe-harbor provisions in Rev. Proc. 2011-29 and filed its return for the Short Period reflecting those provisions but failed to include the required election statement. Taxpayer reasonably relied on a tax professional who failed to notice the omission of the required election statement. Taxpayer is not using hindsight in requesting relief.

Further, based on the facts of the case provided, granting an extension will not prejudice the interests of the Government. Taxpayer will not have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to make the election at this time than Taxpayer would have had if the election had been timely made. In addition, the Short Period in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made will not be closed by the period of limitations on assessment under § 6501(a) before Taxpayer's receipt of the ruling granting an extension of time to make a late election.

#### RULING

Based upon our analysis of the facts as represented, we conclude that Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Accordingly, the requirements of §§ 301.9100-1 and 301.9100-3 have been met.

Taxpayer is granted an extension of 60 days from the date of this ruling to file the statement required by section 4.01(3) of Rev. Proc. 2011-29, stating that it is electing the safe harbor for success-based fees, identifying the transaction, and setting forth the success-based fee amounts that are deducted and that are capitalized.

The ruling contained in this letter is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by appropriate parties. While this office has not verified any of the material submitted in support of the request for the ruling, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter, including whether Taxpayer properly included the correct costs as its success-based fees subject to the election, or whether Taxpayer's transaction was within the scope of Rev. Proc. 2011-29.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this ruling should be attached to Taxpayer's statement.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to Taxpayer's authorized representatives. We are also sending a copy of this letter to the appropriate operating division director. Enclosed is a copy of the letter ruling

showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Code.

Sincerely,

Karin Gross  
Senior Technician Reviewer  
Branch 1  
(Income Tax & Accounting)

Enclosure (1)

cc: